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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 17.

WILLIAM C. ATWATER & COMPANY, INCORPORATED,
Appellant,

against

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

This brief is filed by the appellant in pursuance of leave granted by this Court on October 12th, 1927, when this case first appeared upon call and was submitted by counsel for both parties.

No attempt will be made herein to correct all of the statements in the brief for the United States which the appellant deems inaccurate, but only those questions will be touched upon which have been developed by the Government.

Argument.

With reference to the brief for the United States (p. 8), the contention therein that if there was any taking in the case at bar, it must have been under Section 10 of the

Lever Act (Act August 10, 1917, C. 53, 40 Stat. 276, 279), which authorized the President "to requisition foods, feeds, fuels," etc., is without merit.

A "requisition" is not synonymous with a "taking for public use." There may be a "requisition" without any "taking" and there may be a "taking" without any "requisition."

"Requisition" is a word, the meaning of which is the subject of substantial agreement among authorities.

In Bouvier's Law Dictionary, Rawle's Third Revision, Volume 3, page 2904, "requisition" is defined as "The act of demanding a thing to be done by virtue of some right."

In Volume 34 of Cyc., page 1627, "requisition" is defined as "The act of requiring or demanding."

In Webster's New International Dictionary "requisition" used as a transitive verb is defined: "To make a requisition or authoritative demand for, especially for military purposes"; and "requisition" used as a noun is defined as "The act of requiring or demanding as of right; a demand or application made by authority."

There is unanimity of opinion, therefore, that a "requisition" is a *"demand,"* as distinguished from a "taking."

The amended petition alleges no demand for appellant's coal by the Fuel Administrator. Hence, it does not allege any "requisition." This was the holding of the Court of Claims (Opinion, R., 12, 13).

But it does not follow that said amended petition does not allege a "taking." A "taking" may follow a demand constituting a requisition and be in pursuance of said demand. On the other hand, a "taking" as in the case at bar, may be pursuant to no demand. In the latter event, there is no requisition.

Section 10 of said Lever Act deals only with *requisitions*, and it is only where a *requisition* has been made

that jurisdiction of the Court of Claims has been ousted thereby.

The foregoing distinctions were recognized by this Court in the case of *Bedding Co.* v. *United States*, 266 U. S. 491.

In that case the United States admittedly requisitioned by a circular letter, certain cotton linters of the plaintiff but did not take or use the same, and said cotton linters remained at all times in the plaintiff's possession. Later, the United States started what was referred to in the report of the case as a "commandeering process" but did not complete the same, and at no time took possession of or used the plaintiff's property. The plaintiff sued in the Court of Claims claiming damages due to the fact that the goods had been held subject to the requisition, causing a loss in value. This Court held that there could be no recovery under the Dent Act, March 2, 1919, C. 94, 40 Stat. 1272, because the agreement, if any, had not been "performed in whole or in part" and no "expenditures had been made or obligations incurred on the faith thereof."

This Court further held that no recovery upon express contract could be had under the Tucker Act because the agreement, if any, had not been "reduced to writing and signed by the contracting parties" within Rev. Stats., Sec. 3744, and was wholly executory.

The Court then held as follows (italics ours):

> "Recovery cannot be had as upon an implied contract, because the only authority to *requisition* the linters was that conferred by §10 of the Lever Act (August 10, 1917, c. 53, 40 Stat. 276, 279); and proceedings under that section are not based on contract. Seaboard Air Line Ry. Co. *v.* United States, 261 U. S. 299, 304. Moreover, they must be brought in the District Court. United States *v.* Pfitsch, 256 U. S. 547.

> "We have no occasion, therefore, to consider whether the United States could ever be liable under the Tucker Act, as for a taking, for loss suffered through abandonment of the 'commandeering process,' where the owner had retained possession of the property and the Government had neither accepted, used, nor injured it. Compare Garrison *v.* City of New York, 21 Wall. 196; Bauman *v.* Ross, 167 U. S. 548, 598-9; Omnia Commercial Co. *v.* United States, 261 U. S. 502, 508-9. Nor need we consider whether it could have been held liable under the Lever Act, if suit had been brought in the District Court."

As there was a "requisition" in the *Bedding* case, the Court had no occasion to pass upon the question as to whether or not in the absence of the requisition, the United States would have been liable even though the owner retained possession. The implication, however, is that if there had been no requisition, the Court would have had to consider the question of liability, even without a showing of any disturbance of the plaintiff's possession.

In the case at bar, not only is there no requisition alleged, but there is alleged an actual taking of possession of the plaintiff's coal by the United States through the Fuel Administrator, and a withholding of the same, as is fully argued in the appellant's main brief.

With further reference to the brief for the United States (p. 10), the Government quoted from the case of *Merritt* v. *United States*, 267 U. S. 338, 341, as follows:

> "The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain, concise, statement of the facts relied upon."

The Government, however, failed to complete the quotation from the *Merritt* case which continues as follows:

> "See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met." (Citing cases.)

It is submitted that the amended petition herein bears no analogy to the common counts and that it fully apprises the defendant as to what must be met, and that it fully complies with the requirements of pleading of the Court of Claims when given a fair construction.

With further reference to the brief for the United States, and to the oft repeated statement therein (see pp. 3, 4) that the function of the Tidewater Coal Exchange was merely to keep a record of credits in, and withdrawals from, the various consigning pools, the appellant respectfully requests the attention of the Court to Tidewater Coal Exchange Rules 9, 10 and 16 (R., 8, 9). Under Rule 9 (R., 8), the assignment of coal to members had to be authorized by the Exchange, and the Commissioner had the right to allow overdrafts from the various pools. Rule 10 (R., 8) contemplated such overdrafts and provided for adjustments in the event thereof.

Under Rule 16 (R., 9), deliveries of coal could be made by the railroads only on written orders of the Commissioner of the Exchange.

It therefore appears that the rules of the Exchange contemplated that the Commissioner should have discretionary powers to deal with the coal, not in any sense limited to the mere keeping of a bookkeeping record of shipments and withdrawals.

With further reference to the brief for the United States (pp. 13 and 14), the reference made by the Government to "paragraph 15" of the Exchange Rules has no application to the facts in the case at bar. The amended petition does not allege any controversy with reference to the operation of the Exchange. Further than this, it can-

not be seriously contended that the Executive Committee and Railroad Committee of the Exchange could award damages or compensation against the United States.

In conclusion it should be said that the object of the order of the Fuel Administrator (R., 4-7), was to increase the shipment and facilitate the distribution of coal, in order to aid the successful prosecution of the war, the support and maintenance of the army and navy, and to prevent local or general scarcity of coal (R., 5).

The order, however, did not *require* shipments of coal but only stated that *if coal were shipped,* it should be shipped to the Tidewater Coal Exchange. If, therefore, said order and the rules made a part thereof had been so construed at the time they were made as to place upon a shipper of coal an increased risk due to shipment in pursuance thereof, involving a parting of possession and control of the coal and no recourse in the event of a failure to currently receive an equivalent amount thereof, *the inevitable and obvious result would have been to prevent the operators from shipping in pursuance of said order and consequently to defeat the very purpose for which the order was made.*

It is submitted that at this late date this Court should not be quick to give to the facts set forth in the amended petition an interpretation which would have defeated the very purpose and object of the action of the Fuel Administrator in endeavoring to aid in the more efficient prosecution of the war.

Respectfully submitted,

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